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IN THE

Supreme Court of the United States

OCTOBER TERM—1949.

No. 557.

OVERLAKES FREIGHT CORPORATION,
Petitioner,

—against—

ELIZABETH MURPHY, Administratrix of the goods, chattels and credits of Thomas Murphy, deceased,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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THE COURT PRESS, N. Y. C.

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OTHER AUTHORITY CITED:

Federal Rule of Civil Procedure 49 (b), 28 U. S. C. following Sec. 723 c	1, 3, 4, 7

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Statement.

Petitioner's Statement is acceptable to Respondent.

The Questions Presented.

I—In a seaman's action for damages based upon aggravation of far-advanced tuberculosis, was his failure to disclose the pre-existence of that disease, of which he had knowledge, a defense available in law to the ship-owner and

II—If so, is not the ship-owner, who interrogates the jury under Federal Rule of Civil Procedure 49 (b) upon such defense raised in its pleading entitled

to a finding by the jury as to whether that defense has been proved?

Reasons for Denying the Petition.

As to Question I.

This question cannot be raised before the Court in this case since the vital factor in the question is "of which he had knowledge". Every one admits that Plaintiff-Respondent had tuberculosis but Defendant-Petitioner states his question to assume that Respondent knew at the time he entered Petitioner's employ that he was suffering from tuberculosis. This is in direct contradiction to the record. The record can, by no conceivable stretch of the imagination, imply such to be the fact. Plaintiff testified that he was well, had no knowledge of illness and did not know what tuberculosis was (R. 85-95). The hospital records on the other hand showed an active, advanced case of tuberculosis at the time Plaintiff entered Defendant's employ and it was so stipulated (R. 359).

The opinion below, by Frank, *C. J.*, clearly supports Respondent's contentions.

At page 155 *et seq.*

> "4. Defendant in its answer set up as a defense that Murphy's illness, if any, existed before his employment on Defendant's vessel, and that Murphy failed to disclose that fact when he then entered Defendant's employ. Some courts have recognized such a defense in suits for wages or for maintenance and cure. Whether such a defense is open in a suit like this, we need not decide, for these reasons: (a) Assuming, arguendo,

such a defense to be valid, Defendant had the burden of proof, (b) The trial judge submitted to the jury the following special interrogatory: 'Did the decedent know at the time he entered the service aboard the "Sultana" that he was suffering from active pulmonary tuberculosis?' There was evidence which would reasonably have supported an answer either way. But eight jurors answered No, and four jurors gave no answer because (so the Foreman reported) 'they were undecided and couldn't make up their minds.' This answer was the equivalent of a statement that the Defendant had not persuaded the entire jury that Murphy was aware of his illness. The Defendant therefore did not discharge its burden of proof as to this defense."

The jury returned a general verdict in Plaintiff's favor. Therefore Petitioner cannot present a question which assumes the Respondent had knowledge of this condition when the record clearly shows the exact opposite. And since this point cannot be raised, it cannot be the basis for granting a writ of certiorari.

As to Question II.

As the learned Court below so ably pointed out Petitioner did not discharge his burden of proof on the issue of Respondent's prior knowledge of his condition. The jury declined to find in Petitioner's favor on this issue and found a general verdict in Respondent's favor instead. This is all that logic requires to refute Petitioner's second question as well; however we will examine Federal Rule of Civil Procedure 49 (b) to determine its effect on our situation.

That rule discloses three situations that may arise

thereunder. In the first situation—"Where the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers."

This clearly applies to the instant case. Petitioner cannot demand that the twelve jurors agree unanimously. Eight voted against Petitioner, four could not decide, hence all twelve said Petitioner had not met his burden of proof. Petitioner can ask for nothing else; and this special verdict was therefore harmonious with Respondent's general verdict. The Court was therefore correct in entering judgment on the general verdict.

The other two situations presented by the rule require the presence of an inconsistency, a vote in Petitioner's favor; there is none such here.

In addition, the trial Court is prohibited from entering judgment on the verdict only in the third situation where special verdicts are inconsistent with both each other and the general verdict. As we have shown above, this cannot be our situation.

In support of our position we refer the Court to the following cases cited and explained in our brief below:

Bass v. *Dehner,* 103 F. (2d) 28 (1939), 10 C. C. A.;

Co-operative Transit Co. v. *Bayoub,* 138 F. (2d) 534 (1943), 6 C. C. A.;

Ivey v. *Phillips Petroleum Co.,* 36 F. Supp. 811 (1941), D. C. S. D. Tex.;

Thayer v. *Denver & Rio Grande Western RR. Co.,* 25 N. M. 559, 185 P. 542;

Wayne v. *New York Life Insurance Co.,* 2 F. R. D. 202 (1942), D. C. W. D. Mo.

In conclusion, this case does not bring up the problem of considerable importance that Petitioner stated in his Petition and Respondent submits that the remainder, a question on procedure, is a matter properly left by the Federal Rules of Civil Procedure to the discretion of the trial Court.

CONCLUSION.

It is respectfully submitted that the Petition should be denied.

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APPENDIX.

Federal Rule of Civil Procedure 49 (b). 28 U. S. C. following Sec. 723 c.

"GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES:

The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary for a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."